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No. 88-1414

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

THE PEOPLE OF THE STATE OF CALIFORNIA,

Petitioner,

v.

KHALID PARWEZ,

Respondent.

On Petition for Writ of Certiorari
to the California Court of Appeal,
Second Appellate District, Division Five

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

The People of the State of California seek this Court's intervention in what has thus far been several unsuccessful attempts over the past few years to persuade the Supreme Court of California to overrule its decision in People v. Superior Court (Engert), 31 Cal.3d 797 (1982), which concluded that "subdivision (a)(14) in Penal Code section 190.2 is unconstitutionally vague and violative of the due process clause of the Fourteenth Amendment of the United States Constitution and article I, sections 7, subdivisions (a) and 15 of the Constitution of the State of California." Id. at 806. Relying heavily upon Maynard v. Cartwright, 486 U.S. __ (1988), the People variously maintain that "the California Supreme Court misjudged federal law," Pet. at 7, and that "the result in Engert was wrong." Id. at 11.

The short answer to this argument is that the California Supreme Court's Engert analysis (which the California Court of Appeal was bound to follow in the present case) of the statutory special circumstance

provision at issue constituted an adequate and independent state ground for that decision -- hence for this one. Michigan v. Long, 463 U.S. 1032 (1983). The somewhat longer answer is that the State of California has failed to demonstrate that Maynard v. Cartwright, supra, governs the proper application of the statutory provision at issue, in the procedural posture under which this case has been brought before this Court -- the sustaining of respondent's demurrer to the subject special circumstance allegation prior to the preliminary examination, and without any factual basis for determining its applicability to this defendant's prosecution. On either ground, the petition for writ of certiorari should be denied.

ADDITION TO STATEMENT OF THE CASE

Petitioner's Statement of the Case is correct as far as it goes. Pet. at 4-6. Since the underlying appeal arises from a municipal court magistrate's ruling sustaining respondent's demurrer to the special circumstance allegation prior to the preliminary hearing, this Court should be further advised that during the pendency of that appeal a preliminary examination was conducted on the charge that respondent had committed the murder of Rahael Parwez as alleged in the felony complaint, and that respondent was held to answer on that charge. The matter is currently awaiting trial in the superior court. As petitioner indicates, the California Court of Appeal has stayed issuance of the remittitur at petitioner's request until March 24, 1989. Id. at 5-6.

Prior to coming here, after the Court of Appeal had affirmed the superior court's ruling refusing to compel the magistrate to reinstate the special circumstance allegation, petitioner sought discretionary review in the Supreme Court of California asserting the incorrectness of its previous Engert decision in light of Maynard v. Cartwright. Respondent filed an answer to that petition for review in the California Supreme Court on November 8, 1988, urging its denial because (1) the procedural posture was inapposite for review and (2) reconsideration under Cartwright required a proper factual record in order to consider whether a constitutionally permissibly "narrowing principle" as contemplated by that decision could be arrived at for Cal. Penal Code § 190.2(a)(14) without regard to the facts of this particular case, "on an as-applied basis." 486 U.S. at __, 100 L.Ed.2d

at 380. Because respondent's discussion of these issues was before the Supreme Court of California when it declined to review the California Court of Appeal's decision in this case, respondent has appended his Answer to Petition for Review to this opposing brief.

REASONS FOR DENYING THE PETITION FOR CERTIORARI

I. THE ENGERT DECISION ON WHICH THE CALIFORNIA COURT OF APPEAL EXCLUSIVELY RELIED RESTED ON AN ADEQUATE AND INDEPENDENT STATE CONSTITUTIONAL GROUND

In Michigan v. Long, 463 U.S. 1032 (1983) this Court adopted an analytical framework to implement its jurisdictional concern with rendering advisory opinions in cases where, upon examination of state law, it is determined that the judgment of a state court rests on an adequate and independent state ground.

> "Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."

Id. at 1041.

Although the California Supreme Court's decision in People v. Superior Court (Engert), 31 Cal.3d 797 (1982) clearly, as petitioner acknowledges, "was based upon both federal and state grounds," Pet. at 7, the State merely asserts without discussion the "interweaving" factor noted in Long, and summarily suggests that "the most reasonable explanation for the decision of the California Supreme Court in Engert is that it 'decided the case the way it did because it believed that federal law required it to do so.'" Id. at 8. In the discussion that follows, the People resort to decisional background predating Michigan v. Long (citing previous decisions in the Engert litigation that were subsequently deleted from publication and, through operation of California law, Cal. Rules of Ct., R. 977, may not be cited in California judicial proceedings); the petition then once more reiterates, in conclusory fashion, that "Engert decided a federal question, and is, therefore, now subject to review by this Court through the vehicle of the case at bar, albeit that at the time Engert

was declared by the California Supreme Court to rest on both state and federal grounds, it was not then subject to such review." Pet. at 10. This assumption cannot withstand critical analysis; a more careful reading of the Engert decision reflects the independent state-law basis for the California Supreme Court's holding -- a view to which that court evidently, at least implicitly, still adheres. See People v. Silva, 45 Cal.3d 604, 631 (1988). Cf. People v. Bean, 46 Cal.3d 919, 957 (1988) (applying Engert to claim under another state constitutional provision barring cruel or unusual punishment).

In Michigan v. Long, this court reviewed a Michigan Supreme Court decision holding a protective weapons search unconstitutional under Terry v. Ohio, 392 U.S. 1 (1968). The state court held the search of Long's vehicle to have been proscribed by both the Fourth Amendment and an article of the Michigan Constitution. In its review of that decision, this Court's opinion in Long noted that except for two citations to the state constitution the Michigan court had relied exclusively on its understanding of Terry and other federal cases. "Not a single state case was cited to support the state court's holding that the search of the passenger compartment was unconstitutional." 463 U.S. at 1043.

This Court thus concluded in Long that the lower court opinion's "references to the state constitution in no way indicate that the decision below rested on grounds in any way independent from the state court's interpretation of federal law." Id. at 1044. Moreover, even if independent protection was provided by Michigan's constitution for certain rights also secured under the Fourth Amendment, "it fairly appears in this case that the Michigan Supreme Court rested its decision primarily on federal law." Ibid.

The case at bar could not be more different. The California Supreme Court's Engert decision upheld the trial court's ruling striking the special circumstance allegation that the murders were "especially heinous, atrocious, or cruel, manifesting exceptional depravity," Cal. Pen. Code § 190.2(a)(14), "on grounds that it was unconstitutionally vague and violative of due process in failing to 'provide an ascertainable standard of conduct or workable standard of guilt.'" 31 Cal.3d at 800. The California Supreme Court relied not only

on landmark cases decided by this Court addressing the constitutional prohibition of vaguely-worded criminal statutes, Lanzetta v. New Jersey 306 U.S. 451, 453 (1939); Connally v. General Const. Co., 269 U.S. 385, 391 (1926), but it cited California's leading case on this issue and quoted specifically from Justice Traynor: "A statute must be definite enough to provide a standard of conduct for those whose activities are proscribed as well as a standard for the ascertainment of guilt by the courts called upon to apply it." People v. McCaughan, 49 Cal.2d 409, 414 (1957), quoted with emphasis added in Engert, supra, 31 Cal.3d at 801. Numerous California cases have addressed and applied Justice Traynor's test in McCaughan to other statutory provisions challenged on void-for-vagueness grounds. E.g., People v. Smith, 35 Cal.3d 798, 809-810 (1984); People v. Grubb, 63 Cal.2d 614, 619-622 (1965); In re Newbern, 53 Cal.2d 786, 792-797 (1960).

Having found that "the pejoratives" in Cal. Pen. Code § 190.2(a)(14) had failed to meet "the standards of precision and certainty required of statutes which render persons eligible for punishment," Engert, 31 Cal.3d at 802, the California Supreme Court next considered the People's suggestion that it "save the statute" by judicial construction that would narrow the scope of the special circumstance. In answer to the People's proposed clarification of the statutory terms it had deemed imprecise and uncertain, the Engert court repeated its previous statement in another important California case, Pryor v. Municipal Court, 25 Cal.3d 238, 249 (1979), that "'vague statutory language is not rendered more precise by defining it in terms or synonyms of equal or greater uncertainty.'" Engert at 803.

In contrast with Michigan v. Long, the Engert decision clearly did not rest "primarily on federal law" nor even "on grounds in any way independent from the state court's interpretation of federal law." Indeed, as phrased in McCaughan and repeated in Engert, California's standard for assessing vagueness utilizes a dual measurement, viz., the challenged statutes must be both "definite enough to provide a standard of conduct for those whose activities are proscribed as well as a standard for the ascertainment of guilt by the courts called upon to apply it." 49 Cal.2d at 414. The dual nature of this standard is mirrored in the Engert court's holding: "The conclusion is inescapable

that the language of subdivision (a)(14) is so vague that men of common intelligence must guess at its meaning, and trial judges and jurors will look in vain for a standard for ascertainment of guilt or, in this case, for determination of the truth of the special circumstance." 31 Cal.3d at 803, emphasis added.

There is no merit to petitioner's studious avoidance of this plain reliance on California decisional analysis by repeated reference to the California Supreme Court's assertedly erroneous unwillingness in Engert to follow this Court's reasoning in Proffitt v. Florida, 428 U.S. 242 (1976). Although a single dissenting justice in Engert could "find no significant differences between the two state laws" at issue in Florida and California, 31 Cal.3d at 418 (Richardson, J., dis.), the majority in Engert disagreed with the People's contention that it was bound by Proffitt. As petitioner fails to note, the court in Engert did not merely rely on "the differing roles played by the aggravating circumstance in the Florida statutory scheme reviewed in Proffitt and the special circumstance in the California statute which we review here." Id. at 804. The majority also emphasized "the different issues before the courts" in the two cases. Id. at 806. It specifically contrasted the narrower issue before this Court in Proffitt -- "whether the imposition of the sentence of death for the crime of murder under the law of Florida violates the Eighth and Fourteenth Amendments," 428 U.S. at 244 -- with "our broad inquiry . . . whether the special circumstance in the California statute is so vague and uncertain that a finding thereunder violates fundamental principles of due process. That death is a potential punishment upon a finding of the special circumstance is irrelevant to our determination." Engert at 804, emphasis added.

A final indication that Engert was decided on independent state grounds is found in the fourth and final part of the California Supreme Court's decision examining the People's contention that a separate provision of the California Constitution (art. I, § 27) "insulates the death penalty against any state constitutional defect." 31 Cal.3d at 807. As Engert framed the issue posed, "[I]n the People's view . . . this court is precluded from determining, on state grounds, whether the special circumstance statute at issue meets our due process requirement

of certainty and specificity." 31 Cal.3d at 807. In the course of rejecting the interpretation of Cal. Const., art. I, § 27, sought by the People, the Engert court concluded the provision "was not intended to insulate every potential capital case from the requirement of state constitutional due process." Id. at 809. The court based its conclusion "not only on the language of the section and its relevant legislative history" but also "by the realization that the logical extension of the People's interpretation would produce absurd results." Ibid.

The remainder of Engert discussion is worth quoting verbatim:

> "One example will suffice: We determined in In re Newbern (1960) 53 Cal.2d 786 [3 Cal.Rptr. 364, 350 P.2d 116], that the 'common drunk' provision of the vagrancy law was void for vagueness, precluding imposition of a county jail term. Logically, it follows from the People's submission that under section 27 of article I the same statute would be immune from state constitutional review if the penalty for being a common drunk were death." Ibid.

Stated otherwise, the California Supreme Court refused to create an exception out of its duty to review on state due process grounds the vagueness of a statute merely because the legislative body has deemed an offense punishable by the death penalty. The court could not have signaled more clearly its reliance "on bona fide separate, adequate, and independent state grounds," Michigan v. Long, 463 U.S. at 1041. In these circumstances, this Court has declared it "will not undertake to review the decision." Ibid.

II. THE PRESENT CASE IS IN AN INAPPROPRIATE PROCEDURAL POSTURE WITHOUT A FACTUAL RECORD TO CONSIDER WHETHER A "NARROWING PRINCIPLE" OR A "LIMITING CONSTRUCTION" OF CAL. PENAL CODE § 190.2(A)(14) IS POSSIBLE UNDER MAYNARD V. CARTWRIGHT

As observed previously, the California Supreme Court's decision in People v. Superior Court (Engert), supra, 31 Cal.3d 797, on which the appellate court's decision in the present case is squarely based, held the challenged special circumstance provision facially unconstitutional on due process grounds. Pointing out that the court did so "without any consideration of its [Pen. Code § 190.2(a)(14)] application to a particular situation," Pet. at 12, the State urges that even if a due process approach was the proper means of determining the constitutional

issue "Maynard also makes it clear that the result in Engert was wrong." Pet. at 11. Reliance is placed on this passage in Maynard v. Cartwright, supra:

> "Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk. Vagueness challenges to statutes not threatening First Amendment interests are examined in light of the facts of the case at hand; the statute is judged on an as-applied basis."

100 L.Ed.2d at 380.

Although respondent submits the People's resort to the federal Eighth Amendment standards applied in Maynard v. Cartwright confuses apples with oranges (the latter represented by the state due process standards articulated in Engert), the People unfortunately present their challenge to California's continued and consistent adherence to Engert in a total evidentiary vacuum. There are thus two even more fundamental reasons why this is not an appropriate occasion for this Court's consideration of the impact which Cartwright may have on Engert, if any. First, the instant appeal from an order which in effect upholds the preliminary hearing magistrate's sustaining of respondent's demurrer to the subject special circumstance allegation presents a particularly inappropriate procedural juncture for addressing this question and, because defendant has long since been held to answer for trial and there are no other special circumstance allegations pending, it is unfair that he bear the brunt of the People's attempt to resurrect this statute on a strictly facial basis. Second, the prosecution's reliance upon the "narrowing principle" explicated in Maynard v. Cartwright only reinforces the conclusion that any reconsideration of Engert requires a factual anchor totally lacking in this appeal from a ruling at the demurrer stage.

Respondent has previously set forth in some detail his views on this subject when he answered the People's petition for review to the California Supreme Court. Because the same considerations that may have led the state's high court to decline reconsideration of Engert may logically be even more compelling when a writ of certiorari is sought from this Court, respondent has taken the liberty of appending to his opposing brief the Answer to Petition for Review submitted below.

instead of repeating those reasons here and unnecessarily extending this opposition (although they are certainly pertinent to the question whether this Court should hear this matter), respondent merely summarizes his position with brief reference to the California statute governing appellate review in this procedural posture.

As petitioner indicates, the People's appeal arises from a superior court's denial of their motion to reinstate the special circumstance allegation at issue in the felony complaint, following a magistrate's ruling sustaining respondent's demurrer to that allegation. Pet. at 4-5. Although the People correctly refer to California Penal Code §. 871.5 as the procedural vehicle for such review, they fail to address respondent's contention before the California Supreme Court in responding to the petition for review of the Court of Appeal's decision that § 871.5 also authorized appellate review of the very same issue, i.e., the constitutionality of a special circumstance allegation, after development of a factual basis for the allegation at the preliminary examination. See A-3 - A-6. Moreover, petitioner essentially ignores the fact that while this appeal was pending, another representative of the same district attorney's office prosecuted a preliminary hearing against respondent for the charge of murder at which he was held to answer for future trial (still pending at this time) for that offense. Had the People sought reinstatement of the special circumstance allegation after the preliminary examination, on the ground that the requisite probable cause to support trial on that allegation had been established as well, the state courts as well as this Court would not have had the constitutional issue presented in sterile form devoid of an evidentiary basis.

Even more fundamentally, this procedural posture is incompatible with JUSTICE WHITE's explanation in Maynard v. Cartwright that "Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 (1972)." 100 L.Ed.2d at 380. Thus, in Cartwright this

Court found its analysis in Godfrey v. Georgia, 446 U.S. 420 (1980) "very relevant," because there the state supreme court "failed to apply its previously recognized limiting construction" of the aggravating circumstance at issue; according to JUSTICE WHITE, Godfrey "plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." Maynard v. Cartwright, 100 L.Ed.2d at 381-382.

How has petitioner sought to extrapolate "some narrowing principle" from the special circumstances provision here? Clearly not by examining the statute "in light of the facts of the case at hand" or by judging it "on an as-applied basis." Id. at 380. Rather than taking advantage of the broad availability of further review under Cal. Pen. Code § 871.5 and awaiting the preliminary examination to determine whether the principles of Cartwright -- as applied to the facts of the case at hand -- raise federal constitutional questions concerning the viability of the decision in Engert, which might be appropriately challenged on appeal to the state appellate courts and then on to this Court, petitioner has adhered to its quest for reconsideration of the statute's facial constitutional validity notwithstanding the simultaneous and somewhat inconsistent insistence that a constitutionally-permissible "narrowing principle" should have governed the facts of this particular case.

One might do well to ask whether this decision by the State reflects a purposeful tactic to avoid judicial consideration at the state level of the probable nonexistence of such facts, or at least the insufficiency of the evidence even for purpose of a holding order on the special circumstance allegation, despite the apparent sufficiency of the evidence presented at the preliminary examination to uphold the murder charge itself. This distinct possibility reinforces the conclusion that the instant case is clearly not suitable for this Court's inquiry into whether Cal. Pen. Code § 190.2(a)(14) may be free of constitutionally-forbidden unchanneled jury discretion when viewed "on an as-applied basis."

CONCLUSION

For the foregoing reasons, the California Supreme Court judgment in People v. Superior Court (Engert) rests on independent state-law grounds. Because the California Court of Appeal was bound under state law to follow Engert in the present case, there is no federal question for this court to review as it is raised by petitioner. Moreover, the procedural posture of this case, without any record from a preliminary examination or some evidentiary basis to believe the § 190.2(a)(14) allegation would even apply to respondent's case, makes this a singularly inappropriate vehicle for considering whether Maynard v. Cartwright requires the California courts to abandon the principles set forth in Engert. No sufficient -- let alone compelling -- reasons have been presented that warrant this court's intervention by discretionary review on writ of certiorari. The petition should accordingly be denied.

Respectfully submitted,

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APPENDIX

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	Crim. S007594
Plaintiff and Appellant,	2d Crim. B033193
v.	(LASC No. A887428)
KHALID PARWEZ,	
Defendant and Respondent.	

NOV - 8 1988

ANSWER TO PETITION FOR REVIEW
OF DECISION OF THE COURT OF APPEAL,
SECOND APPELLATE DISTRICT, DIVISION FIVE

APPEAL FROM THE SUPERIOR COURT OF LOS ANGELES COUNTY
HONORABLE ROBERT MARTINEZ, JUDGE PRESIDING

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellant, v. KHALID PARWEZ, Defendant and Respondent.	Crim. S007594 2d Crim. B033193 (LASC No. A887428)

ANSWER TO PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES:

Undaunted by this court's recent declination of the Attorney General's request for reconsideration of its determination in People v. Superior Court (Engert) (1982) 31 Cal.3d 797 that the "heinous, atrocious or cruel" special circumstance provision (Pen. Code § 190.2, subd. (a)(14)) is unconstitutionally vague (People v. Silva (1988) 45 Cal.3d 604, 631; accord People v. Wade (1988) 44 Cal.3d 975, 993) -- and emboldened by two recent instances in which this court has reexamined and overruled its past decisions -- the People herein ask this court to reconsider Engert and either entirely overrule that decision or adopt a construction of the statute that complies with the "narrowing principle" which the United States Supreme Court this past Term suggested might cure the constitutional infirmity of a comparable aggravating circumstance challenged as vague under the

Eighth Amendment. (Maynard v. Cartwright (1988) 486 U.S. __ [100 L.Ed.2d 372, 380-382, 108 S.Ct. 1853, 1858-1859].)

It is perhaps enough to answer that the People's petition herein presents nothing to demonstrate the necessity for reconsideration of the Engert decision that has not already been brought to the court's attention and rejected presumably after due consideration.[1/] And although the People take particular comfort in this court's recent departure from past precedent in Moradi-Shalal v. Fireman's Fund Insurance Companies (1988) 46 Cal.3d 287, they necessarily recognize the force of the argument that if Engert were overruled, "subdivision (a)(14) [of Penal Code § 190.2] would simply be applied prospectively to murder cases filed after an opinion becomes final. (Moradi-Shalal, 46 Cal.3d at p. 305.)" (Pet. for Rev., p. 9.) This court, of course, has long eschewed the rendering of advisory opinions. (Younger v. Superior Court (1978) 21 Cal.3d 102, 119-120.)

In any event, there are even more fundamental reasons why this case is not an opportune vehicle for reconsideration of the Engert decision. First, the instant appeal from an order which in effect upholds the preliminary hearing magistrate's sustaining of defendant's demurrer to the subject special circumstance allegation presents a particularly inappropriate procedural juncture for addressing this question and, because

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1/ As unblushingly acknowledged in a discussion labeled "Stare Decisis", the instant petition represents this to be "the third time this year" that the Los Angeles District Attorney's Office is "bringing this issue before this Court." (Pet. for Rev., p. 2 & fn. 3, citing People v. Superior Court (Parwez), L.A. S004477 and People v. Superior Court (Franc), L.A. S004899.)

defendant has long since been held to answer for trial and there are no other special circumstance allegations pending, it is unfair that he bear the brunt of the People's attempt to resurrect this statute on a strictly facial basis. Second, the prosecution's reliance upon the "narrowing principle" explicated in Maynard v. Cartwright only reinforces the conclusion that any reconsideration of Engert requires a factual anchor totally lacking in this appeal from a ruling at the demurrer stage.

1. Procedural Posture Inapposite For Review

It now appears settled that a preliminary hearing magistrate may hear and rule on any demurrer interposed to a felony complaint (In re Geer (1980) 108 Cal.App.3d 1002, 1006-1009); and the detailed procedures for prosecutorial challenge to a magistrate's dismissal order by motion in the superior court "to compel the magistrate to reinstate the complaint . . . on the ground that, as a matter of law, the magistrate erroneously dismissed the action or a portion thereof" (Pen. Code § 871.5, subd. (a), (b); see Landrum v. Superior Court (1981) 30 Cal.3d 1, 5-6, fn. 4) have been extended to dismissals pursuant to Penal Code section 1008 (demurrer sustained without leave to amend or amendment not filed). While the prosecution's right to appeal the magistrate's order herein is thus established (Pen. Code § 1238, subd. (a)(9)), the recognized purpose of the section 871.5 reinstatement-of-complaint procedure -- which places "stringent time limitations and notice requirements" on the district attorney and shifts the burden onto the People "to go forward and demonstrate the impropriety of the magistrate's dismissal" (Ramos v. Superior Court (1982) 32 Cal.3d 26, 37) --

may be somewhat at odds with the concept of Supreme Court review and the somewhat leisurely pace entailed. Even more fundamentally, and as illustrated by the instant case, when the People assert error by the magistrate in dismissing only a portion of the pending action, and the defendant is held to answer and awaits trial, the defendant may be placed on the horns of a classic dilemma: between the Scylla of indefinitely postponed trial notwithstanding his speedy trial rights under Penal Code section 1382, and the Charybdis of twice running the gauntlet in the event favorable rulings of the magistrate and superior court on section 871.5 review are subsequently overturned by an appellate court after completion of defendant's trial on the undismissed portions of the resulting information.

It is true that defendant has not yet been tried; but he was held to answer for the charge of murder (without special circumstances) after preliminary examination in April and May 1988, and presently awaits trial now set for January 1989.[2/] Even assuming a postponement for several months, the granting of review in the case at bar unquestionably would delay that trial date for a considerable additional time. This court appears not to have previously addressed in the present posture the interaction of the defendant's statutory right to a speedy trial and the People's statutory right of appeal from a partial dismissal of his case (but cf. Anderson v. Superior Court (1967)

2/ Appellate counsel understands that defendant's trial counsel has been ordered to proceed to trial in another homicide case that has been given priority, and that jury trial in this case is likely to be continued until completion of the earlier scheduled matter.

66 Cal.2d 863), and it is unnecessary to do so here at this juncture. However, where as in this case the defendant is charged with a single count of murder (Pen. Code § 187, subd. (a)) for which he has been held to answer and is awaiting trial, and the People have appealed the trial court's denial of a motion to reinstate a special circumstance allegation that would increase the maximum punishment from 25 years to life to either life imprisonment without parole or the death penalty, the competing problems recognized by Justice Mosk in Anderson caution great circumspection when this court is called upon to review an issue that, if eventually resolved against the defendant, may render him vulnerable to capital punishment only on the eve of his trial for homicide -- or even after trial has commenced.

A second, related concern with the procedural posture of this case arises from the fact that a preliminary examination has since been conducted and the prosecution has presumably met its burden of establishing "some rational ground" to justify a determination of probable cause the defendant committed the charged offense. (See Williams v. Superior Court (1969) 71 Cal.2d 1144, 1147-1148.) Although Penal Code section 871.5 is equally available as a vehicle for the district attorney to seek reinstatement of a portion of the felony complaint that has been dismissed by the preliminary hearing magistrate, and the denial of a motion to reinstate is similarly appealable (Pen. Code § 1238, subd. (a)(9)), such review based upon an evidentiary record may well be far superior to consideration after ruling on a demurrer of the same legal issue as to which the underlying facts have some bearing. (Cf. People v. Luna (1983) 140 Cal.App.3d 788,

792 [§ 871.5 procedures "available only when the magistrate's order is based upon an erroneous legal ruling as opposed to a finding of fact"].)

Here, the constitutional issue is presented in sterile form devoid of evidentiary substance. Not only is the People's present appeal brought to this court without a factual basis to permit consideration of whether the defendant should have been held to answer on the basis of the "especially heinous, atrocious or cruel" special circumstance allegation to which the magistrate sustained defendant's demurrer, but there is no assurance that the People would ever be able to present evidence to support the allegation and consequent greater punishment.

2. Reconsideration Under Maynard v. Cartwright Requires A Factual Record

The People readily appreciate that a "starting point for reconsideration" of People v. Superior Court (Engert), supra, 31 Cal.3d 797 "must be a sound and legitimate basis for believing that the earlier case was wrongly decided." (Pet. for Rev., p. 2.) Beside the dissenting opinion of Justice Richardson in the Engert case, and the fact that Justices Lucas and Panelli "at one time . . . expressed the view that Engert was wrongly decided" (Id., pp. 2-3),[3/] reliance is placed upon the intervening decision in Maynard v. Cartwright, supra, 486 U.S. __ [100 L.Ed.2d 372] for the proposition that Engert "was based upon and erroneous

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3/ Citing to the subsequently vacated initial opinion in People v. Wade, supra, although the opinion on rehearing did not reiterate that view (44 Cal.3d at p. 993 [accepting respondent's concession of error under Engert]).

analytical standard" and that proper application of the federal constitutional standard "permits an 'especially heinous, atrocious or cruel' special or aggravating circumstance so long as 'some narrowing principle' or 'limiting construction' is used by the trier of fact in the application of the special circumstance to the facts of the case." (Pet. for Rev., p. 3, footnotes omitted.) The People therefore urge that Engert "misjudged federal law when it held that subdivision (a)(14) [of Penal Code section 190.2] violated the due process clause of the United States Constitution." (Ibid.)

Although the short shrift which the petition gives the Engert majority's reliance alternatively upon the due process clause of the California Constitution is suspect (cf. People v. Anderson (1987) 43 Cal.3d 1104, 1150-1151 [Ramos error]), its attempt to invoke federal constitutional principles as articulated in Maynard v. Cartwright is flawed for a more fundamental reason. As Justice White explained in Cartwright, "Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 (1972)." (100 L.Ed.2d at p. 380.) The high court thus found "very relevant" its analysis in Godfrey v. Georgia (1980) 446 U.S. 420, in which it had held that the Georgia Supreme Court "failed to apply its previously recognized limiting construction" of the aggravating

circumstance at issue ("outrageously or wantonly vile, horrible or inhuman"); according to Justice White, Godfrey "plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." (Maynard v. Cartwright, supra, 100 L.Ed.2d at pp. 381-382.)

In their quest to extrapolate "some narrowing principle" in order "to save subdivision (a)(14) from constitutional infirmity" (Pet. for Rev., p. 15, footnote omitted), the People choose to disregard the manner in which the United States Supreme Court applied Godfrey in upholding the determination of the Tenth Circuit Court of Appeals that Oklahoma's "especially heinous, atrocious or cruel" aggravating circumstance was unconstitutionally vague under the Eighth Amendment. (Cartwright, supra, 100 L.Ed.2d at p. 382.) First, Cartwright found that the language of the Oklahoma provision -- identical to the California special circumstance at issue herein -- "gave no more than [sic] guidance than the 'outrageously or wantonly vile, horrible or inhuman' language that the jury returned in its verdict in Godfrey." (Ibid.) Much as with Justice Kaus's concern with the adverb "especially" in Engert (31 Cal.3d at pp. 801-802), Maynard v. Cartwright rejected as untenable the state's contention that the addition of "especially" to the term "heinous" any more limited the overbreadth of the aggravating factor than the addition of "outrageously or wantonly" to the term "vile" in Godfrey. (100 L.Ed.2d at p. 382.) Secondly, Cartwright concluded that the provision's constitutional

infirmity was not cured by the state court's reliance on facts which supported the jury's finding. Finally, Cartwright rejected the state's reading of the Court of Appeals' decision as requiring torture or serious physical abuse as "the only limiting construction of the heinous, atrocious or cruel aggravating circumstance that would be constitutionally acceptable." (Ibid.)

In light of the Supreme Court's reasoning upholding the federal appellate court's determination that the statutory aggravating circumstance was not unconstitutionally vague as applied to the facts of the case at hand, the People's position herein that the identically-worded special circumstance should be resurrected through a "limiting construction" without resort to a particular set of facts would appear to pose the identical problem resolved in Godfrey and Cartwright.4/ The quest for such a "narrowing principle" through "linkage" of the words "heinous, atrocious or cruel" with the concepts of "manifesting exceptional depravity" and "a conscienceless or pitiless crime which is unnecessarily torturous" (Pet. for Rev., pp. 17-19) only heightens the form of suspended animation in which this case is brought to the court. This is particularly revealed in the highly debatable notion that "[e]xceptional depravity can be manifested by severe mutilation or deformation of the victim, whether dead

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4/ Not only does it appear that Justice Kaus in Engert may have anticipated this turn of events in his brief discussion of Godfrey (see 31 Cal.3d at p. 805, fn. 6), but the Engert court's disapproval in footnote 8 (id. at p. 806) of Allen v. Superior Court (1980) 113 Cal.App.3d 42, which (at p. 52) distinguished Godfrey in a way that may also appear questionable in light of Cartwright, only serves to reinforce the conclusion that any reconsideration of the principles set forth in Engert must await a factually-based challenge.

or alive which takes place 'contemporaneously' with the killing and can therefore properly be said to be unnecessarily torturous to the victim." (Id. at p. 19.) That the drafters of the California and New Jersey provisions may have contemplated differing reaches of the same language than Georgia or (as limited by the appellate court in Cartwright) Oklahoma, should not be the basis for arriving at a constitutionally permissible "narrowing principle" without regard to the facts of an individual case.

As observed earlier, the prosecution was not procedurally restricted to seeking appellate review of their unsuccessful request for Penal Code section 871.5 relief following the magistrate's sustaining of a demurrer to the special circumstance allegation. As with an uncharged offense shown by the evidence, at the close of the preliminary hearing the People could have moved the magistrate to add such allegation and find it true for purpose of holding the defendant to answer for trial (see People v. Brice (1982) 130 Cal.App.3d 201, 207-209; cf. People v. Superior Court (Mendella) (1983) 33 Cal.3d 754 [enhancement]); if unsuccessful, a timely request for reinstatement of the allegation was available under Penal Code section 871.5 and appeal could have been taken from an adverse ruling at that point in time, governed by the same standard of review as utilized when a charge or penalty allegation is added under Penal Code section 739 in the felony information. (See People v. Slaughter (1984) 35 Cal.3d 629, 639-642.)

Having failed to take those logical steps to present the issue in light of the facts, the People may well have placed

this court in the position of being asked to overrule an earlier decision for which the evidence would never justify prosecuting defendant thereon. The teachings of Cartwright thus not only caution against hasty reconsideration of Engert, but suggest the necessity -- and indeed wisdom -- of a factual record in order to demonstrate that "on an as-applied basis" (100 L.Ed.2d at p. 380), section 190.2, subdivision (a)(14) does not allow constitutionally-forbidden unchanneled jury discretion.

CONCLUSION

Because the procedural avenue chosen by the People to appeal the magistrate's ruling poses an unpalatable Hobson's Choice for the defendant, and because the lack of an adequate factual foundation for reexamining the Engert decision raises constitutional questions under Maynard v. Cartwright, the case at bar presents formidable procedural, factual and legal hurdles to the request that this court repudiate yet another of its precedents. In such an evidentiary vacuum, the court should decline the invitation to do so. For the reasons described above, the petition for review should accordingly be denied.

Respectfully submitted,

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(PROOF OF SERVICE BY MAIL - 1013a, 2015.5 C.C.P)

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the aforesaid County, State of California; I am over the age of eighteen years and not a party to the within action; my business address is 1448 15th Street, Suite 104, Santa Monica, California 90404.

On November 8, 1988, I served the foregoing ANSWER TO PETITION FOR REVIEW on the Interested Parties in this action by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Santa Monica, California, addressed as follows:

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PRESIDING JUDGE
LOS ANGELES SUPERIOR COURT
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Los Angeles, California

ATTN: Robert Martinez, Judge

CALIFORNIA COURT OF APPEAL
Second Appellate District, Division Five
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I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

DATED: November 8, 1988

Donna K. Benton

DONNA K. BENTON